Lian Mong Yee v Abdul Rashid bin Maidin & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B–02–247 OF 1998
GOPAL SRI RAM, MOKHTAR SIDIN AND MOHD SAARI JJCA
18 JUNE 2001

Civil Procedure *— Judgments and orders — Consent order — Payment by respondents under consent order in return for appellant's withdrawal of allegation of cheating against respondents — Whether court below correct in allowing recovery by respondents — No finding of 'coercion' under s 73 of Contracts Act 1950 — Respondents in pari delicto — Contracts Act 1950 s 73*

Civil Procedure *— Judgments and orders — Consent order — Withdrawal of — Appellant's withdrawal of allegation of cheating by respondents as consideration for payment by respondents under consent order — Cheating a non-compoundable offence — Whether agreement to withdraw allegation of offence against public policy and void — Whether consent order void*

Civil Procedure *— Jurisdiction — High Court — Action originating in Kuala Lumpur High Court transferred to Shah Alam High Court by latter — Whether Shah Alam High Court had jurisdiction to do so — Courts of Judicature Act 1964 Schedule para 12*

Civil Procedure *— Jurisdiction — High Court — Illegality of judgment — Whether within jurisdiction of High Court to grant declaration that consent order void and unenforceable by reason of illegality*

The appellant and respondents were parties to a prior litigation. During the course of that litigation, the appellant lodged a report against, inter alia, the first respondent, alleging the commission of a non-compoundable offence (cheating) by the first respondent. Subsequently, the parties to that litigation entered into a consent order, which required the instant respondents to pay the appellant RM5.1m in full and final settlement of the latter's claim. An integral part of the consideration for this payment provided that the appellant was to withdraw all complaints and reports against the respondents. A further consideration was that the injunction that the respondents had earlier obtained against the appellant would be dissolved. The appellant later took steps to enforce the consent order. He instituted winding up proceedings against the corporate respondents and bankruptcy proceedings against the natural respondents. The respondents wanted to truncate the enforcement proceedings and to return to the *status quo ante*, immediately prior to the consent order, and took out an originating summons in the Shah Alam High Court, claiming, inter alia: that the consent order to be set aside, the Kuala Lumpur High Court civil suit be transferred to the Shah Alam High Court, all execution and enforcement proceedings under the consent order be set aside/struck off and the payment of RM5.1m pursuant to the consent order be deposited with the court pending disposal of the civil suit. The judge who heard the summons granted the relief sought and the appellant appealed. The two issues raised were the lawfulness

of the consideration provided for in the agreement and the right of a party to recover moneys paid under such a contract.

Held, dismissing the appeal and varying the order below:

(1) The appellant had agreed not to go forward on the charge of cheating he had alleged in his police report against the first respondent. As observed by the Supreme Court in *Ooi Kiah Inn Charles & Anor v Kukuh Maju Industries Sdn Bhd (formerly known as Pembinaan Muncul Hebat Sdn Bhd)* [1993] 2 MLJ 224, cheating being a non-compoundable offence, an agreement to retract a police report that alleged such an offence was against public policy and void (see p 46B); *Ooi Kiah Inn Charles & Anor v Kukuh Maju Industries Sdn Bhd (formerly known as Pembinaan Muncul Hebat Sdn Bhd)* [1993] 2 MLJ 224 followed. As the consent order was utterly void, the judge was right in setting it aside (see p 46G).

(2) As to whether the judge below ought to have permitted recovery, there had been no finding below of 'coercion' within s 73 of the Contracts Act 1950, whilst the respondents had admitted to the fact that they had asked for the term to retract the police report under the consent order. Although there was much force in the appellant's argument that relief in respect of the repayment ought to have been denied at least on the ground that the respondents had not proved coercion within s 73, relief on this count should be denied on the additional ground advanced by the appellant, that the respondents were in *pari delicto*. The oppression and abject submission in *Smith v Cuff* (1817) 105 ER 1203, the principle upon which s 73 was based, was simply absent here. Hence, the judge's order requiring the appellant to pay the sum of RM5.1m had to be set aside (see pp 47H–48B); *Smith v Cuff* (1817) 105 ER 1203 distinguished.

(3) The judge had no jurisdiction to order the transfer of the prior suit to the Shah Alam High Court. Paragraph 12 of the Courts of Judicature Act 1964 empowers a High Court to transfer a suit before it to another court, but does not confer jurisdiction in the opposite direction. Accordingly, the previous action ought to continue in the court in which it originated (see p 48B–C).

Per curiam:

The parties to a consent order would, ordinarily, be entitled to move the High Court for a declaration that the order was void and unenforceable by reason of its illegality. It is well within the jurisdiction of the High Court to grant such a declaration. Equity, in order to give complete justice, has always asserted jurisdiction to grant consequential relief by setting aside void transactions either on terms or *sans* any terms (see p 44B–C); *Cooper v Phibbs* (1867) LR 2 HL 149

and *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507 followed. The jurisdiction to set aside a contract is universal and extends to all types of void contracts. It demonstrates the flexibility of equity in the field of remedies and its ability to do complete justice in cases where the common law is found wanting. Like any other equitable jurisdiction, it is subject to discretionary bars that operate upon the conscience of the particular litigant (see p 44E).

[Bahasa Malaysia summary

Perayu dan responden-responden adalah pihak-pihak kepada satu litigasi terdahulu. Semasa litigasi berjalan, perayu telah memasukkan satu laporan terhadap, antara lain, responden pertama, mendakwa kesalahan yang tidak dikenakan kompaun yang telah dilakukan (menipu) oleh responden pertama. Berikutan itu, pihak-pihak kepada litigasi tersebut telah memasuki satu perintah persetujuan, yang menghendaki responden-responden sekarang ini untuk membayar perayu RM5.1j dengan penuh dan penyelesaian akhir kepada tuntutan perayu. Satu bahagian penting dalam pertimbangan pembayaran ini menghendaki perayu menarik balik semua aduan dan laporan terhadap responden-responden. Pertimbangan selanjutnya adalah bahawa injunksi yang responden-responden telah perolehi terlebih dahulu terhadap perayu akan dibatalkan. Perayu kemudiannya telah mengambil langkah-langkah untuk menguat-kuasakan perintah persetujuan tersebut. Beliau memulakan prosiding penggulungan terhadap responden-responden korporat dan prosiding kebangkrapan terhadap responden-responden asal. Responden-responden ingin menghentikan prosiding penguatkuasaan tersebut dan kembali kepada *status quo ante*, sejurus sebelum perintah persetujuan tersebut, dan memulakan satu saman pemula di Mahkamah Tinggi Shah Alam, menuntut, antara lain: bahawa perintah persetujuan tersebut diketepikan, guaman sivil Mahkamah Tinggi Kuala Lumpur dipindahkan ke Mahkamah Tinggi Shah Alam, semua prosiding pelaksanaan dan penguatkuasaan di bawah perintah persetujuan tersebut diketepi/dibatalkan dan pembayaran menurut perintah persetujuan tersebut didepositkan ke mahkamah sementara menunggu penyelesaian guaman sivil tersebut. Hakim yang mendengar saman telah memberikan relif yang dipohon dan perayu telah merayu. Dua persoalan yang ditimbulkan adalah tentang kesahihan pertimbangan yang diperuntukkan untuk satu perjanjian dan hak satu pihak mendapat kembali wang yang dibayar di bawah kontrak sedemikian.

Diputuskan, menolak rayuan tersebut dan mengubah perintah di mahkamah bawah:

(1) Perayu telah bersetuju untuk tidak meneruskan pertuduhan tentang penipuan yang beliau telah katakan dalam laporan polis terhadap respoden pertama. Sebagaimana yang ditelitikan oleh

Mahkamah Agung dalam *Ooi Kiah Inn Charles & Anor v Kukuh Maju Industries Sdn Bhd (formerly known as Pembinaan Muncul Hebat Sdn Bhd)* [1993] 2 MLJ 224, penipuan yang merupaka satu kesalahan yang tidak dikenakan kompaun, satu perjanjian untuk menarik balik satu laporan polis yang mendakwa kesalahan sedemikian adalah bertentangan polisi awam dan terbatal (lihat ms 46B); *Ooi Kiah Inn Charles & Anor v Kukuh Maju Industries Sdn Bhd (formerly known as Pembinaan Muncul Hebat Sdn Bhd)* [1993] 2 MLJ 224. Memandangkan perintah persetujuan tersebut sememangnya terbatal, hakim adalah betul untuk mengetepikannya (lihat ms 46G).

(2) Berhubung sama ada hakim bawahan patut membenarkan pengembalian semula tersebut, tidak terdapat penemuan di bawah 'paksaan' dalam s 73 Akta Kontrak 1950, memandangkan responden-responden telah mengakui fakta yang mereka telah meminta terma untuk menarik balik laporan polis di bawah perintah persetujuan tersebut. Walaupun terdapat desakan dalam hujah perayu bahawa relif berhubung pembayaran balik tersebut sepatutnya dinafikan sekurang-kurangnya atas alasan bahawa responden-respoden tidak dapat membuktikan paksaan dalam s 73, relif di sini sepatutnya dinafikan atas alasan tambahan yang diutarakan oleh perayu, bahawa responden-responden adalah *pari delicto*. Hujah penindasan dan keterlampauan dalam *Smith v Cuff* (1817) 105 ER 1203, prinsip yang menjadi asas s 73, memang tidak wujud di sini. Oleh itu, perintah hakim yang menghendaki perayu membayar jumlah RM5.1j patut diketepikan (lihat ms 47H–48B); *Smith v Cuff* (1817) 105 ER 1203 dibeza.

(3) Hakim tersebut tidak mempunyai bidang kuasa untuk memerintahkan pemindahan guaman terdahulu ke Mahkamah Tinggi Shah Alam. Perenggan 12 Akta Mahkamah Kehakiman 1964 memberikan kuasa kepada Mahkamah Tinggi untuk memindahkan satu guaman yang dihadapkan kepadanya kepada mahkamah lain, tetapi tidak memberikan bidang kuasa sebaliknya. Adalah wajar, tindakan sebelum ini patut diteruskan dalam mahkamah yang ia asalnya bermula (lihat ms 48B–C).

Per curiam:

Pihak-pihak kepada perintah persetujuan tersebut, akan, biasanya, berhak untuk memohon Mahkamah Tinggi untuk satu deklarasi bahawa perintah tersebut adalah batal dan tidak boleh dikuatkuasakan oleh sebab ia menyalahi undang-undang. Ia sememangnya adalah dalam bidang kuasa Mahkamah Tinggi untuk memberikan deklarasi sedemikian. Ekuiti, bagi tujuan keadilan menyeluruh dilakukan, sentiasa menegaskan bidang kuasa untuk memberikan relif tambahan dengan mengetepikan transaksi-transaksi yang terbatal sama ada berhubung terma-terma atau *sans* apa-apa terma (lihat ms 44B–C); *Cooper v Phibbs* (1867) LR 2 HL 149 dan *Magee v Pennine Insurance*

Co Ltd [1969] 2 QB 50 diikut. Bidang kuasa untuk mengetepikan satu kontrak adalah sejagat dan meliputi semua jenis kontrak-kontrak yang terbatal. Ia menunjukkan kelenturan ekuiti dalam bidang remedi-remedi dan keupayaannya untuk melaksanakan keadilan dalam kes-kes di mana undang-undang *common law* diperlukan. Seperti mana-mana bidang kuasa ekuiti lain, ia tertakluk kepada had-had budi bicara yang berfungsi berdasarkan naluri litigan tertentu (lihat ms 44E).]

Notes

For cases on consent order, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3464–3474.

For cases on jurisdiction of the High Court, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3724–3775.

Cases referred to

Bhowanipur Banking Corp Ltd v Durgesh Nandini AIR 1941 PC 95 (refd)

Chin Nam Bee Development Sdn Bhd v Tai Kim Choo & Ors [1988] 2 MLJ 117 (folld)

Cooper v Phibbs (1867) LR 2 HL 149 (folld)

Jagdish v Kaussilla Devi AIR 1947 All 317 (not folld)

Kanhaya Lal v National Bank of India Ltd (1913) ILR 40 Cal 598 (folld)

Magee v Pennine Insurance Co Ltd [1969] 2 QB 507 (folld)

Ooi Kiah Inn Charles & Anor v Kukuh Maju Industries Sdn Bhd (formerly known as Pembinaan Muncul Hebat Sdn Bhd) [1993] 2 MLJ 224 (folld)

Shripad v Sanikatta Co-operative Salt Sale Society AIR 1945 Bom 82 (refd)

Smith v Cuff (1817) 105 ER 1203 (distd)

Legislation referred to

Contract Act 1872 [India] ss 23, 24

Contracts Act 1950 ss 15, 24, 25, 73

Courts of Judicature Act 1964 para 12

Appeal from: Originating Summons No MT1–24–786 of 1997 (High Court, Shah Alam)

K Anantham (*CL Wong* with him) (*Skrine & Co*) for the appellant.

KS Narayanan (*Saranjit Singh* with him) (*KS Narayanan Assoc*) for the respondents.

Gopal Sri Ram JCA. (delivering judgment of the court): This appeal raises two short issues. Both have been visited by our courts on previous

A occasions. It has to do with the lawfulness of the consideration provided for an agreement and the right of a party to recover moneys paid under such a contract. The facts of this case are not in dispute.

The appellant and respondents are parties to a prior litigation. During the course of that litigation, the appellant lodged a report against, inter alia, B the first respondent, vide Tun HS Lee Report No 1524/96. It alleged that the first respondent had cheated the appellant over a power plant project abroad. This is a non-compoundable offence.

On 15 October 1996, the parties to the earlier litigation entered into a consent order. In essence, that consent order required the instant respondents to pay the appellant RM5.1m in full and final settlement of the C latter's claim. An integral part of the consideration for this payment appears in a later paragraph of the consent order. It provides that the appellant will apply to the relevant authorities to withdraw all complaints and reports against the respondents. A further consideration for the agreement housed in the consent order was that the injunction that the respondents had earlier obtained against the appellant would be dissolved. Later, the appellant took D steps to enforce the consent order. He instituted winding up proceedings against the corporate respondents and bankruptcy proceedings against the natural respondents. A majority of these proceedings were commenced in the Shah Alam High Court. The respondents wanted to truncate these enforcement proceedings. They wanted to return to the status quo ante, E immediately prior to the consent order. For this purpose, they took out an originating summons in the Shah Alam High Court. They claimed the following relief in their summons:

(1) for an order that the consent order dated 15 October 1996 recorded in Kuala Lumpur High Court Civil Suit No D1–22–16–96 be set aside.

F (2) that upon and in the event this honourable court grants prayer (1) above the following consequential orders be granted:

(a) that the Kuala Lumpur High Court Civil Suit No D1–22–16–96 be transferred to the High Court in Shah Alam and the said action be set down for trial.

(b) that all execution and enforcement proceedings based on the said G consent order including the winding up petitions namely Kuala Lumpur High Court Companies Winding Up No D2–28-305-97 and Shah Alam High Court Companies Winding Up No 28–69–97 and Bankruptcy Proceedings namely Shah Alam High Court Bankruptcy No 29–65–97 and Bankruptcy No 29–61–97 instituted pursuant to the consent order are improper and ought to be set aside/ H struck off.

(c) that the sum of RM5.1m paid pursuant to the consent order to the defendant together with interest thereon from 20 October 1996 to date be forthwith deposited by the defendant with this honourable court in an interest bearing account pending the hearing and disposal of Civil Suit No D1–22–16–96 referred to in (a) above.

I (3) costs; and

(4) such further and other relief as this honourable court may deem fit and proper.

The judge who heard the summons granted the relief sought. The appellant appealed to this court. We heard arguments of counsel on 30 August 2000 and dismissed the appeal. We now give our reasons for upholding the learned judge's order.

There is a preliminary issue that I would like to deal with before embarking upon the questions that lie at the heart of this appeal. It has to do with the correctness of the learned judge's order in setting aside the consent order. No challenge to his jurisdiction to do so has been raised by counsel for the appellant. This is not surprising. Ordinarily, the respondents would have been entitled to move the High Court for a declaration that the consent order was void and unenforceable by reason of its illegality. It is well within the jurisdiction of the High Court to grant such a declaration. Equity, in order to give complete justice, has always asserted jurisdiction to grant consequential relief by setting aside void transactions either on terms or *sans* any terms.

Thus, in *Cooper v Phibbs* (1867) LR 2 HL 149, the lease of a fishery was held to be void on the ground of mistake. The lessee was already the owner of the fishery in question. It was a case of *res sua*. The House of Lords, having found the agreement void, went on to set it aside on terms that the lessor should have a lien on the fishery for such money he had expended on its improvement. In *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507, a majority of the English Court of Appeal set aside a contract for mistake without imposing any terms.

In my judgment, the jurisdiction to set aside a contract is universal and extends to all types of void contracts. It demonstrates the flexibility of equity in the field of remedies and its ability to do complete justice in cases where the common law is found wanting. Like any other equitable jurisdiction, it is subject to discretionary bars that operate upon the conscience of the particular litigant. So, laches, unclean hands, want of mutuality and so forth are grounds upon which equitable relief may be denied.

In the present instance, if the respondents are right in their argument, the consent order is void for illegality. It may, therefore, be set aside like any other agreement. The learned judge, accordingly, had ample jurisdiction to make the order that he did.

That brings me to the critical question. Was the consent order void for illegality? That is the first central issue.

Mr Ananthan, counsel for the appellant, argued that the interpretation placed on the consent order by the respondents is wrong. He says that his client merely agreed to ask for permission to withdraw the report and that there was part performance of the order in that the injunction obtained by the respondents had been discharged to the respondents' benefit. In support of this argument, counsel cited *Shripad v Sanikatta Co-operative Salt Sale Society* AIR 1945 Bombay 82. That case is authority for the proposition that there is a distinction between the motive for a transaction and the consideration for it. It is only when the latter is illegal that an agreement based upon such a consideration is void. The case also decides that an agreement not to object to the withdrawal of a complaint in respect of a

non-compoundable offence is against public policy, since it is the duty of the complainant to wholeheartedly proceed with the prosecution in the interests of justice.

In responding to these arguments, Mr Narayanan, counsel for the respondents, relied on two authorities which he said adequately covered the factual matrix of the present appeal. The first of these is the leading case of *Bhowanipur Banking Corp Ltd v Durgesh Nandini* AIR 1941 PC 95. Lord Atkin, who delivered the advice of the Board, set out the applicable principles governing the parallel provision in the Indian Contract Act 1872. He said (at p 96):

> In all criminal cases reparation where possible is the duty of the offender, and is to be encouraged. It would be a public mischief if on reparation being made or promised by the offender or his friends or relatives mercy shown by the injured party should be used as a pretext for avoiding the reparation promised. On the other hand to insist on reparation as a consideration for a promise to abandon criminal proceedings is a serious abuse of the right of private prosecution. The citizen who proposes to vindicate the criminal law must do so wholeheartedly in the interests of justice, and must not seek his own advantage. It only remains to say that such agreements are from their very nature seldom set out on paper. Like many other contracts they have to be inferred from the conduct of the parties after a survey of the whole circumstances.

The provisions of our Contracts Act 1950 ('the Act') that are relevant to this part of the case are ss 24 and 25. They read as follows:

> 24 The consideration or object of an agreement is lawful, unless —
> (a) it is forbidden by a law;
> (b) it is of such a nature that, if permitted, it would defeat any law;
> (c) it is fraudulent;
> (d) it involves or implies injury to the person or property of another; or
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.
>
> 25 If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

The identical provisions in the Indian statute are ss 23 and 24.

The second authority is *Ooi Kiah Inn Charles & Anor v Kukuh Maju Industries Sdn Bhd (formerly known as Pembinaan Muncul Hebat Sdn Bhd)* [1993] 2 MLJ 224. In that case, the defendants entered into an agreement with the plaintiff under the terms of which two civil suits were compromised. The defendants also executed a guarantee. The plaintiff had, while the disputes were afoot, lodged a report alleging that he had been cheated. As part of the compromise, the plaintiff agreed to withdraw the charges set out in the police report. Subsequently, the plaintiff sued on the guarantee for the balance remaining unpaid under the principal agreement. The trial judge gave judgment for the plaintiff. The defendants appealed.

The Supreme Court allowed the appeal. That much is clear from the text of the judgment, although the report of the case, both in the headnote and its conclusion, erroneously states that the appeal was dismissed. The court held that the agreement in question was one that stifled a prosecution and was, accordingly, void.

Here, too, the appellant had agreed not to go forward on the charge of cheating he had alleged in his police report against the first respondent. As observed by the Supreme Court in *Ooi Kiah Inn*'s case, cheating being a non-compoundable offence, an agreement to retract a police report that alleged such an offence is against public policy and void.

Having considered this part of the case most carefully, I came to the conclusion that there was no distinction of any significant materiality between the present case and *Ooi Kiah Inn*'s case. In particular, I consider *Ooi Kiah Inn*'s case and the cases therein cited — and these include two Privy Council decisions — to bind us as a matter of precedent. They are certainly of much greater weight than the observations of Verma J, in *Jagdish v Kaussilla Devi* AIR 1947 All 317 cited by Mr Anantham. The passage read to us appears at p 325 of the report. This is what it says:

> Considering the matter in all its aspects, I am of opinion that each case must be decided upon its merits and that the courts should look to the substance of the agreement between the parties. If there is any suspicion of blackmail or extortion or if the contract was based upon a promise really to hamper the administration of law so as to prevent investigation into a criminal charge which was of interest not only to the persons concerned but to the public at large, then I have no doubt the contract should not be enforced. If, however, there is it bona fide civil dispute which the parties have decided. to settle and there happen to be subsidiary proceedings in a criminal court it seems to me that would be contrary to public policy and to justice and equity to allow any person to escape his proper legal liabilities on the mere technical ground that there was some understanding that those criminal proceedings would not be pressed to a conclusion.

That, with respect, is not an accurate statement of the law. I must, therefore, reject counsel's stand taken in reliance on that passage.

For the reasons given, I was of the view that the judge in the present case had judicially appreciated the facts and had properly directed himself on the applicable law. It was, therefore, my view that the consent order was utterly void. Following the equity jurisprudence that governs remedies in this area of the law, it was my view that the learned judge was right in setting aside the consent order.

Next, I turn to the consequential orders made by the judge. Here, Mr Anantham's submission was that the parties were in *pari delicto* and the judge ought not to have permitted recovery. Mr Narayanan relies on s 73 of the Act to support the judge's decision on this part of the case. That section (inclusive of its illustrations) reads:

> A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

Illustrations

(a) *A* and *B* jointly owe $100 to *C*. *A* alone pays the amount to *C*, and *B*, not knowing this fact, pays $100 over again to *C*. *C* is bound to repay the amount to *B*.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

Eusoff Chin J (as he then was) explained the ambit of this section in *Chin Nam Bee Development Sdn Bhd v Tai Kim Choo & Ors* [1988] 2 MLJ 117. It is a judgment of first importance because it reiterates in clear terms the proposition that the expression 'coercion' in s 73 of the Act is not 'coercion' as defined by s 15 of the Act. It is to be noted that this approach is supported by the decision of the Privy Council in *Kanhaya Lal v National Bank of India Ltd* (1913) ILR 40 Cal 598, which is referred to in his lordship's judgment. Counsel for the respondents argues that the fact that his clients had asked for the insertion of the calling for the withdrawal of the police report matters not a jot. However, in response to my question, counsel readily agreed that the learned judge made no finding of coercion within s 73 of the Act. In the absence of such a finding, I consider a bald application of the section to be fatally flawed. It is, I think, elementary that a court must first find the facts and then determine whether those facts fall within the legal formula postulated by the relevant statutory provision. Any other approach would be tantamount to applying a statutory provision *in vacuo*. That is a task perhaps best suited for the quiet and rarified atmosphere of the academic's rooms and not for a court of law.

While on s 73 of the Act, there is a case of English vintage which reflects the spirit and intendment of the section in point of the coercion element. Indeed, it is my view that part of the section is based upon the principle established by that case. It is *Smith v Cuff* (1817) 105 ER 1203. The plaintiff in that case was indebted to the defendant and several other creditors. He entered into a composition with his creditors on terms that each shall accept ten shillings in the pound. The defendant agreed to the compromise, but secretly, he demanded and obtained from the plaintiff a promissory note for the full sum of the debt owed to him. The defendant negotiated the note with an innocent third party who then demanded the sum of the note from the plaintiff. The plaintiff having paid upon the note brought an action against the defendant for the sum. It was held that the plaintiff was not in *pari delicto* and could recover because there had been oppression on the one side and submission on the other. The defendant in that case was in a position to dictate and the plaintiff had no alternative but to submit.

However, that is not the case here. As I pointed out during argument, there is nothing in the judge's judgment that finds such facts. Indeed, respondents' counsel conceded that to be the case. As against that, there is the admission by the respondents that they asked for the term. There may have been coercion. There may not. It is not a matter upon which a finding

can be made on mere affidavit evidence. I think there is much force in the appellant's argument that relief in respect of the repayment ought to have been denied at least on the ground that the respondents had not proved coercion within s 73 of the Act. But I think that relief on this count should be denied on the additional ground also advanced by the appellant, namely, that the respondents were in *pari delicto*. The oppression and abject submission that was present in *Smith v Cuff* is simply absent here. Accordingly, I came to the conclusion that so much of the judge's order that requires the appellant to pay the sum of RM5.1m must be set aside.

I now come to that part of the judge's order under which the prior suit was transferred to the Shah Alam High Court. In my view, the learned judge had no jurisdiction to make such an order. Paragraph 12 of the Courts of Judicature Act 1964 empowers a High Court to transfer a suit before it to another court, but it does not confer jurisdiction in the opposite direction. Accordingly, the previous action ought to continue in the court in which it originated.

For the reasons given, the appeal was dismissed but the judge's order was varied to the extent already indicated. The respondents were awarded 75% of the taxed costs here and in the court below. The deposit was ordered to be paid out to the respondents to account of their taxed costs. The prior suit was fixed to be mentioned before the judge in chambers at the High Court in Kuala Lumpur to enable the parties to take directions as to the future conduct of the suit.

My learned brothers Mokhtar Sidin and Mohd Saari JJCA agreed with the decision delivered at the conclusion of argument. They have read this judgment in draft and express their agreement with it.

Appeal dismissed; order below varied.

Reported by Anita Teo